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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. NEWTON and MRS. F. T. NEWTON, Bankrupts

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION.

T. J. Wills,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. John B. Edmonsen, by and through her attorneys, prays that a Writ of Certiorari issue to the Circuit Court of Appeals for 5th Circuit directing it to send up the record in the above entitled cause to be reviewed by this Court and such order entered therein as my appear from the record in the case to be meet and proper.

II

Jurisdiction

The jurisdiction of this Court is invoked and a review sought under the provisions of the statutes and rules of this court governing the granting of Writs of Certiorari.

A. The provisions of Section 240 of the Judicial Code, as amended, Section 347, Title 28, U. S. C. A.

B. The provisions of Rule 38 of this Court.

(5) (b) In that the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. (Title 40—U. S. C. A., section 407.)

(c) And has so far departed from the accepted and usual course of Judicial proceedings as to call for an exercise of this Court's power of supervision. (In that it has set aside the finding of facts of the District Court and the decree entered thereon, where there was no manifest error on the part of the District Court in making the finding of fact and no substantial facts in the record to base the finding made by the Circuit Court of Appeals.)

(d) And has decided a Federal question in a way probably in conflict with applicable decisions of this Court. (Section 67(d) (6) of the Bankruptcy Act. Being the uniform fraudulent conveyance act known as, and designated as, the Chandler Act.)

C. The Circuit Court of Appeals has reversed the finding of facts made by the District Court in conflict with and in breach of the provisions of Rule 52 of the Rules of Civil Procedure, and this Court is respectfully petitioned to set aside said finding of the Circuit Court of Appeals.

III

Case History

We will state the case as briefly as we can to make it clear.

Under date of January 11, 1940, F. T. Newton and F. S. Glenn formed a partnership agreement. On the 21st of July, 1941, Newton and Glenn entered into a general part-

nership contract. Under date of February 15, 1942, Glenn entered into a partnership agreement with his wife, his son and his daughter in which he gave to them a one-fourth interest in his one-third interest in the Newton and Glenn partnership. This was a sub-partnership agreement. This contract was placed of record at Hattiesburg, Mississippi, the home of Newton and Glenn.

Newton & Glenn bid on the Camp Campbell housing project at Clarksville, Tennessee, and was awarded the contract on March 27, 1942.

On April 6, 1942, Newton took into partnership with him six members of his family, making each responsible for the furnishing of capital with which to perform the contract and giving to each a one-seventh interest in the profits derived and a like amount of any liability in any losses that might be sustained (Record, page 292).

This contract was placed of record in the Chancery Clerk's office at Hattiesburg, Mississippi. The contract so entered into was limited to the Camp Campbell project and admitted the six persons executing the contract into the partnership with Newton in his interest in the Newton & Glenn contract. These parties had no interest whatsoever in Glenn's one-third interest in the partnership contract and had no power of control in the execution of the contract except through Newton, who was a member of the prime partnership with whom the government agency had negotiated and awarded the contract for the erection of the housing project.

A like contract was entered into in June, 1942, for the Greenville, Mississippi, Air Base by Newton with the same six members of his family. In August, 1942, a like contract was entered into between Newton and the petitioner herein, Mrs. John B. Edmonson, and her husband, for a Recreation Center at Rohwer, Arkansas, whereby they took a one-

third interest, each, in Newton's two-thirds interest in the contract (Record, page 292, *et sequa.*).

The contracts were performed and each one of the contracts resulted in a profit. Neither Newton nor any one of the six sub-partners put up any money for the construction of the contracts. Two of the contracts were assigned under the statute to the Union & Planters National Bank & Trust Company of Memphis, Tennessee, and the third one to the Deposit Guaranty Bank and Trust Company of Jackson, Mississippi. These three contracts resulted in large profits.

Newton & Glenn, as partners, and in their partnership capacity bid in eight contracts for the construction of housing projects with the United States Government or the Housing Authorities.

On March 1, 1943, Newton & Glenn dissolved their partnership which embraced the aforementioned eight projects. Glenn had withdrawn in excess of $40,000.00 and Newton paid him in cash $80,000.00 more as his interest in the eight contracts. On record, page 795, it is shown that the Bank after taking from the Camp Campbell contract $33,000.00 for the debts of F. T. Newton and $122,000.00 for the debts of Newton & Glenn, having reimbursed itself $945,000.00 advanced on these projects, with which the construction work was accomplished, paid to Newton & Glenn, or F. T. Newton, since Glenn was out of the contracts, the sum of $220,000.00.

On the same page in the record it is shown that the Bank advanced $415,000.00 on the Rohwer, Arkansas project, and after repaying this sum of money and applying $60,000.00 to Newton & Glenn's debts gave to Newton or deposited to his account $57,800.00. The record also shows that the Greenville Air Base made a profit of $141,660.00, which money was paid to Newton in cash by the Jackson, Missis-

sippi, Bank on the assignment of a contract under the provisions of a Federal Statute.

The accounts were audited by a C. P. A., and on August 15, 1943, he filed his audit showing that the profits accruing to petitioner herein were $52,049.79, and a like sum of money representing profits accrued to petitioner's husband, making a total of $104,099.58 due thereon. This petitioner sought to get a distribution of her and her husband's profits. Newton induced them to accept a deed from him and his wife to certain properties, a large portion of which was slum properties in the City of Hattiesburg. There was $85,000.00 in mortgages on the property, for which petitioner assumed the payment and liquidated the $104,000.00 to her and her husband as profits accruing on the three projects in which they were sub-partners. This deed was executed on the 23rd day of August, 1943, and placed of record October 6, 1943.

Newton & Glenn, as a partnership, took their last contract on December 21, 1942, making eight contracts awarded to the partnership of Newton & Glenn. It will be observed, however, that Newton did not take his relatives into a sub-partnership in any other contracts than the three mentioned. They were the first, second and third contracts awarded to Newton & Glenn by the United States Government. It is shown on page 805 of the record that the Bank at Memphis advanced on the assignment of seven of these contracts $4,175,000.00. That it received back from the government that applied to the purchase price of the assigned contracts $4,402,460.00. Reference has been made to page 795 where the Executive Vice President of the Bank showed that he had paid to Newton $462,119.00 in cash from the three contracts in which petitioner herein was a partner. None of this money, however, was paid to the partners with Newton, sub-partners in the Government contracts as their profits accruing from the construction of the projects.

After Newton & Glenn dissolved partnership Newton traveled alone in the contract business. He was successful in bidding in nineteen contracts the next year, 1943.

IV

The Attack on the Property Transfer

Title 40, U. S. C. A., Section 407, provided for the assignments of the contracts awarded by the United States government and its agencies. On July 5, 1943, Newton took a contract with the F. P. H. A. for the construction of a housing project at Brunswick, Georgia. The contract price was in excess of $2,900,000.00. Newton had taken these contracts with the Government and had assigned each and every contract to the Memphis Bank. The proper construction of the Act of Congress would have given Newton the contract value less the Bank's discount and the money would have been paid over to him contemporaneously with the assignment. This statute, however, has not been construed so far as we are able to learn, and it ought to be construed by this court.

The Bank took the assignment and then as a matter of accounting notes for the money advanced on the assigned value. As Newton needed the money he would sign a note and they would then place to his credit a portion of the contract value that had been assigned to it. The repayment was guaranteed by the United States Government.

As the work progressed monthly estimates of completed work and material placed on the project was made by the contractor, approved by the Engineer in charge, and submitted for payment. It was the rule of the government in making the settlement to retain 10% designated as retainage to be paid on the completion of the project. Newton's nineteen projects were running along contemporaneously and a retainage of ten per cent on each project was being

made. So that of the $7,000,000.00 approximately of contracts that Newton as an individual had when completed would have a retainage of $700,000.00. In addition to this retainage the Government's payment was always thirty days or more behind the expenditure of money advanced in the performing of the contract. This caused from $1,000,000.00 to $1,500,000.00 of completed value in suspense. If the Act of Congress is to be construed that Newton owed this money, it would appear that he owed the Bank that amount of money. However, if the statute is construed that when the contract value was assigned that it was an obligation of the Government to pay, then Newton would owe no money to the bank. If there was a delay in completing the job for any appreciable period of time it would show a greater spread between the money advanced by the Bank and the money refunded to the Bank by the government. Labor shortage usually does and in this instance did result in some delays.

When the Bank discovered on the 16th of October, 1943 that Newton had conveyed this property to petitioner in settlement of her part of the profits made on the three projects in which she and her husband were sub-partners it refused to put up more money. It had the assignment of $2,900,000.00 of the F. P. H. A. job and the record shows that it had only put up $1,400,000.00. It had a $1,500,000.00 in the retainage on the Brunswick job. On the nineteen contracts and the necessary delay between the advancement of the money with which to do the construction work and the approval by the government engineers of the finished work for payment was great. So the Bank's assertion that Newton owed it $1,500,000.00 was made when he did not owe them a dollar. This depended upon the construction of Section 407, Title 40, U. S. C. A.

V

The Title of Petitioner to the Property Was Attacked

A petition in Bankruptcy was filed against Newton on the 3rd day of November, 1943. On November 5, 1943, a petition was filed to set aside the deed to this petitioner as having been executed with a fraudulent intent to hinder and delay Newton's creditors.

This case was tried before the District Judge. He had previously adjudicated Newton a bankrupt after setting aside a verdict of a jury that was rendered in his favor, on the ground that in making the deed Newton intended to defraud his creditors. In the trial of this case the Court held that there was no fraudulent intent on the part of this petitioner to hinder or delay Newton's creditors or to defraud them in any way. That her action in accepting the conveyance was for a valuable consideration without any fraudulent intent whatsoever. The court held, however, that the price paid for the property was not its fair and equitable value. That petitioner was not entitled to hold the property, but that she was entitled to her money and entitled to retain the property until she was reimbursed. The Court directed that on reimbursement of her money that she would make a deed therefor to Newton's trustee in bankruptcy.

The District Judge in finding the facts based it upon the ground that there had been nothing to indicate to this petitioner or that the Bank would refuse to put up the remaining money to complete the contracts. The Court followed the provisions of the Chandler Act which adopted a Federal Uniform Fraudulent Conveyance Act for all Bankruptcy proceedings. (Section 67(d) (6) of the Bankruptcy Act, Section 107, Title 11, U. S. C. A.)

The Circuit Court of Appeals without citing authorities

or referring to any testimony to support its action set aside and invalidated the finding of fact by the District Judge. It refused to be controlled or even concerned over the provisions of Section 407, Title 40, U. S. C. A. It declined to apply Section 67 (d) (6) of the Bankruptcy Act, commonly referred to as the Chandler Act.

The Circuit Court of Appeals was not persuaded to give effect to Rule 52 of the Civil Rules of Procedure or the Act of Congress, or to give potency to the finding of fact by the District Judge, who had an opportunity to observe the witnesses as they testified. The finding of the District Court is Appendix A and the opinion of the C. C. A. is made Appendix B hereto.

Summary

The District Judge held that the contract of partnership was a good and valid sub-partnership.

The C. C. A. reversed this finding with no evidence to warrant it in so doing. The Appellate Court held that the agreement was without consideration. Each sub-partner had a one-seventh interest in Newton's two-third interest. This interest was assigned to the Bank with the interest of all others and hereby procured all the money used in the construction of the project. They bound themselves by a promise for a promise.

The District Court held that the interest of Petitioner was $52,049.78. The record for both litigants shows that she had this amount proven. The Appellate Court overruled the District Court without any basis for so doing.

The District Court held that there was no fraud or fraudulent intent on the Petitioner. The Appellate Court held that acts of other persons interested in the Newton affairs committed months after this conveyance proved that the sub-partnership agreement was entered into with fraud-

ulent intent. This was such a departure from accepted judicial procedure as to call for a review by this Court.

The District Court gave effect to Title 40 U. S. C. A., paragraph 407. The Appellate Court departed from the principles established by said Act.

The District Court followed. Section 67(d) (6) of the Bankrupt Act. The Appellate Court held it does not apply.

We respectfully submit to this Court that the opinion of the Circuit Court of Appeals is in error. That its failure to give effect to the Acts of Congress herein referred to places this case in the class with those that this Court will order certified up for review. That this case should be ordered up by Writ of Certiorari and the action of the Circuit Court of Appeals should be reversed with directions.

T. J. Wills,
Sol. for Petitioner.

The partnership of Newton & Glenn was awarded its first government contract on March 27, 1942. This was the Camp Campbell, Tennessee, one.

On April 6, 1942, Newton took into partnership agreement his six relatives, in which he gave to each a one-seventh interest in his two-thirds interest in this contract so awarded them. This contract appears in this record, pages 216-221, inclusive. On June 4, 1942, this contract was placed of record on the land deed records in Hattiesburg, Forrest County, Mississippi. The contract provided for each one of the parties to share for the capital invested, equally, in the two-thirds interest of the said F. T. Newton in said contract; that each one should share equally in the profits that accrued or the losses that might be sustained by virtue of the contract.

This contract was a sub-partnership one. The District Judge so found. His finding was correct, see

47 Corpus Juris, Pages 715;
40 American Jurisprudence 135;
American English Encyclopedia of Law (2nd Edition) 17.

In placing this contract on record it gave notice to the world of its existence and what were its terms.

The Circuit Court of Appeals set aside the District Court's finding without any evidence to sustain its action. Its action in so doing violates the acts of Congress and is in conflict with Rule 52 of Civil Procedure.

Neither Newton nor Glenn had the money with which to perform the contract. Four days after the contract between Newton and his six relatives was entered into he assigned the entire contract to the Union Planters National Bank & Trust Company of Memphis, Tennessee.

This assignment was made of the entire contract value, which is shown to be $1,332,418.52. The Bank accepted the assignment and advanced the money necessary for the construction of the contract. The amount advanced was $945,000.00. There was a profit of $376,566.07. The bank applied $33,368.75 to other debts of Newton and $122,618.95 to the debts of Newton & Glenn, and gave to Newton by placing to his deposit account the sum of $220,578.37. (See record, page 795).

The District Judge found this fact from the evidence. The C. C. A. set aside his finding without any evidence to support its findings.

There were partnership agreements, as shown by the record, as to the Greenville, Mississippi, contract and the contract for the project at Rohwer, Arkansas. On page 795 of the record it will be seen that as to the Rohwer, Arkansas, project there was deposited to Newton's deposit account, which was a payment in cash, $57,800.00. The Greenville, Mississippi, contract was financed by the Deposit Guaranty Bank & Trust Company of Jackson, Mississippi, and it is shown on page 92 of this record that the net profit to Newton on the Greenville, Mississippi, contract totaled $141,660.18.

We invite the Court's attention to the fact that this money was paid to Newton by the Bank. The sub-partnership agreement provided that he was to be the agent of all the sub-partners in obtaining the money, in managing the construction of the project and the handling of the affairs generally.

The profits so made gave to each of the sub-partners $52,049.79.

On March 1, 1943, Newton & Glenn dissolved their partnership. Glenn had withdrawn $40,000 from the business and Newton paid him $80,000.00 more, making $120,000.00 that he took out of the partnership business.

Newton & Glenn, as partners, had taken and performed eight contracts for the Federal government. Each and every contract value had been assigned to the Union & Planters National Bank & Trust Company of Memphis, Tennessee, except the Greenville, Mississippi, project, which was assigned to the Jackson, Mississippi, Bank.

The partnership agreement between Newton and his relatives only extended to the first, second and third contracts entered into with the Government. Each one carried with it a separate partnership agreement as to the individual project under construction.

Newton claimed to his sub-partners that he had not had the accounts of the three projects audited, but as soon as they were audited he would give them their share of the money. We call the Court's attention specially to the fact that the Bank had already paid Newton the profits derived from these three contracts. Newton in turn had settled with Glenn, the prime partner in the partnership of Newton & Glenn.

On August 15, 1943, R. G. Wooten, C. P. A., completed the audit of the three projects in which the six Newton relatives were sub-partners showing the sum of $52,049.79 due each one. Combining the amount due Mrs. Edmonson, the petitioner herein, with that of her husband make the amount due them $104,099.58.

After these contracts had been performed and the money had been paid to the bank and by the bank distributed to Newton, Newton & Glenn dissolved their partnership. Thereafter Newton took contracts in his own name under the trade name of "Newton Construction Company". The contracts so taken had no connection whatever with the Newton & Glenn contracts, or the three contracts in which Newton had his relatives as sub-partners with him.

As above stated, Newton & Glenn had eight contracts with the government. Newton and his six relatives were

sub-partners in three, being the first, second and third contracts awarded to Newton & Glenn. The Newton & Glenn contracts were completed. This record discloses (page 805) that of the eight Newton & Glenn contracts one of them was assigned to the Jackson, Mississippi, bank and made a profit of $141,660.00 And the other seven, aggregating $4,429,165.45, were assigned to the Union & Planters National Bank & Trust Company of Memphis. The Memphis Bank advanced on the assignment so made the sum of $4,175,000.00 and received back from the government $4,402,460.64. This was $227,000.00 more than the Bank had advanced, on and, as the purchase price of the contracts assigned. The record shows that all of the money necessary to perform these contracts was advanced by the bank.

Newton was due to make distribution of the profits at the time that he received the cash from the bank that accrued to the three contracts in which the sub-partnership existed. He had not done so, however, and on August 15, 1943, when the audit was finally made of these contracts he had the other nineteen contracts that he himself had taken with the government in 1943 under construction. Newton induced petitioner herein and her husband to accept title to the rental properties that he had in Hattiesburg and to pay the $85,000.00 mortgage on said property in lieu of the said money coming to them as their profits in the partnership agreement.

The agreement between Newton and the six members of his family, above referred to, is a sub-partnership agreement. The profits derived therefrom was not a debt that Newton owed to the sub-partners, but bore the same relationship as the partnership profits in any other ordinary partnership relation.

The District held that the profits of Petitioner and her husband was $104,099.58. The C. C. A. without a con-

tradictory word of evidence held that the burden had not been met in proving these profits.

There was no rushing of the deed for record or haste with respect to taking possession and beginning the collection of rents. The transaction continued to move in the ordinary and usual way. The deed was placed of record on October 6, 1943, and the rentals began to be collected as of October 1, 1943, in accordance with the agreement made when the transfer contract was entered into.

Section 407—Title 40—U. S. C. A., provides in paragraph (a) that with the written consent of the sureties and the approval of the contracting agency of the government, that the contractor may assign the entire contract value of a governmental contract to a bank. This record shows that in each and every case Newton had assigned the contracts to the Memphis Bank. All of the Newton & Glenn contracts, with the exception of one, was assigned to the same Memphis Bank. Less than thirty days before this conveyance was made, the largest contract awarded to Newton was awarded to the Brunswick, Georgia, Housing Project. This contract was with the F. P. H. A. and was for just a little less than $3,000,000.00. In less than thirty days time this contract was assigned to the Memphis Bank, and at the time the deed of conveyance and settlement was made with the petitioner herein the Bank had advanced only $150,000.00 on the almost $8,000,000.00 assigned value.

When this assignment was made to the bank it passed the title of the contract to the Bank. The contractor had a performance bond and a payment bond executed in accordance with the provisions of Section 270 (a) and 270 (b), Title 40—U. S. C. A. The government was taking no chances in allowing this assignment to be made, because if the contractor failed to carry out his contract and to pay for it. The bonding company was a company that had

been approved by the contracting agency, otherwise the contract would not have been awarded.

The Act of Congress contemplated that the entire contract value, less a banking discount, would be made available immediately on the assignment to the Bank by the Contractor.

Paragraph (b) of the Section provided that this money when given to the Contractor by the Bank was a trust fund and it outlined how he could expend it.

Paragraph (c) of the Section provides that the Bank will not be obligated in any way to see that the funds were properly expended. The entire responsibility rested upon the contractor and the sureties on his performance and payment bonds.

This Act of Congress has not been construed by this Court, but should be under a proper construction of the act the money advanced is not a charge against the contractor but the obligation of the Government. This will put the Bank in default. Newton would never owe the Bank. He would either perform or the Bonding Company would be called on and Newton would owe it. The claim that Newton owed the Bank is without foundation in fact or law.

As each contract was performed monthly estimates of the completed work was made by the contractor, checked and approved by the Government Engineer and forwarded to the proper office for payment.

The money advanced on the assignment by the Bank had already been expended to that amount in the purchase of material and construction of the project. The government in making installment payments retained ten percent. This retainage was not paid until the contract was completed and accepted by the Government Engineer in charge.

On account of this handling the spread between the

amount advanced by the Bank to the contractor and spent in the prosecution of the work and the amount refunded to the Bank by the Government increased on each estimate made and approved for payment.

It appears that the Bank got panicky because of the amount of the difference in the monies advanced and the government payments made.

On the 16th of October, 1943, the spread was approximately $1,500,000.00, accepting the Bank's figures. This represented the ten percent retainage and the expenditures going into contractor's estimates for which government checks had not been issued to the bank. The Bank refused to advance more money and Newton was unable, as a result thereof, to meet his payroll. The Government in protecting organized labor inserted in the contract that default in payment of the labor would be grounds for the cancellation of the contract and the taking of it over to be completed otherwise. The failure to advance the $225,000.00 needed as of October 16, 1943, resulted in the cancellation of the contracts. It is shown that seventeen of the contracts had been more than ninety-five percent completed. So that in each one ten percent of ninety-five percent of the contract value was tied up in government retainage. $480,000.00 of the Bank's money was tied up in Brunswick, Georgia, contract, on which an estimate on that day should have gone in and a government check sent to the Bank in payment thereof.

In support of this statement we call the Court's attention to the testimony of Mr. Wilson, Executive Vice President of the Bank, where it appears on page 793, where the bonding company enjoined the payment to the Bank of this check that should have gone in on that day in the sum of $477,411.46.

The Bank's claim that Newton owed to the Bank on October 16, 1943, $1,531,171.89 was arrived at by subtract-

ing the amount collected from the government through October 16, 1943, from the amount that the Bank had advanced on all of the contracts. At the middle of page 809, under Exhibit #3 to Wilson's testimony, it stated that the amount paid to the assignor was $9,890,490.23, and that the collections from the government through October 16, 1943, was $8,359,318.34, leaving a balance due by the assignor to the Bank of $1,531,171.89. Now, this spread between the amount that the government had refunded to the bank doesn't represent that a single dollar of the money was owed by the assignor to the Bank.

Senator Walsh introduced in the Senate to President Roosevelt's Recovery Act the amendment which when passed became Section 407, Title 40, U.S.C.A. The discussion shows that it was the intention of the amendment of giving to the Banks the authority to accept the assignments from the contractors of Public Works jobs. That all the Bank had to do was to advance the contract value so assigned, less the reasonable discount, and then await the refund of its money from the government. But, for this Act, the President's recovery legislation would have been of no avail. This Court has not passed on nor interpreted this Act.

The Circuit Court of Appeals in its opinion in this case said that Newton owed the Bank more than $1,500,000.00. In our petition for a rehearing we challenged this, but the Court turned a deaf ear. At the time the Bank refused to advance the money, it had $2,033,000.00 of unexpended contract value assigned to it. Newton needed a large percentage of that amount to complete the contracts, but with his contract value assigned he couldn't raise the money elsewhere. It was the duty of the Bank to advance it, and if the interpretation of the Circuit Court of Appeals is allowed to stand, then, that Congressional Enactment that sheds luster on the name of Senator Walsh, President

Roosevelt and the Congress in pulling us out of the depression became a booby trap to blow the feet off of the contractors, who find themselves in the hands of unwise bank officials. We think that this Court should take jurisdiction of this case and hold that when the Bank accepted the assignment it was under contract with the government to put up this money to the amount of the contract price for the completion of these public contracts.

The District Judge saw this, and we call the Court's attention to his statement of facts in his opinion in this case. Of course, the District Court didn't go as strong as he should have gone. He didn't go as strong as this Court will go. It was a task indeed to have the purpose and effect of this legislation understood. However, the petitioner here accepted the District Judge's findings without challenge.

Petitioner was anxious to get her money. She took the property tendered her. She didn't think that she was getting more than was coming to her. The property was assessed at $170,000.00 on the assessment rolls for taxes. She was paying $189,000.00. She had no intention to defraud Newton's creditors. To have had such an intention she would have had to have been a soothsayer with ability to foretell that the Bank was going to breach its agreement with the government to put up this money and hereby put Newton into difficulties. That is what the District Judge found the facts to be. The Circuit Court of Appeals has spoken in its opinion as if the sub-partnership agreement was covered with ignomy. It differed with the District Judge by refusing to see the facts. His statement is true and correct. The statement of the Circuit Court of Appeals contains the error.

The Circuit Court of Appeals in construing the Chandler Act, Section 67 (d) (6) of the Bankrupt Act, said that it had no application to a case of this kind. The Chandler Act, amending the Bankruptcy Act, has made a general Fraudu-

lent Conveyance Act to be enforced alike in every state of the union. No other Fraudulent Conveyance Acts are applicable to Bankrupt cases. It makes the length of time twelve months in which the Bankrupt Court can reach out and draw unto itself property that has passed from the Bankrupt at less than its fair equivalent value. While it can do that, the Congress has said that if the grantees in the conveyance had paid a valuable consideration without intent to hinder and defraud the creditors, that they should receive their money back.

The Court's statement that the Act does not apply to a case like this is deciding the case contrary to the plain intent of the statute and probable in conflict with the applicable decisions of this Court.

The Circuit Court of Appeals set aside the finding of fact made by the District Court in violation of Rule 52 of the Rules of this Court and the statute made and provided.

There were many conflicts in the testimony. However, the language of this Court in *Schreyer* v. *Platt* is a complete answer to the attack thereon, the Court said:

> "It is objected by the appellees that Schreyer's testimony is not to be depended upon, because contradictory, confused, and uncertain; that there is no definiteness in it as to amounts and dates; and that wrong in the transactions is evident, because the moneys received for rent after the conveyances were deposited by Schreyer in his own name, in bank, and were obviously managed and handled by him as his own, as no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund, in his hands. But does all this indicate fraud? If his testimony is worthless, and to be rejected, then there is practically no testimony interpreting those transactions; and the court never presumes fraud. The very confusion and carelessness int he dealings between husband and wife make against, rather than in favor of, the claim of fraud."

Schreyer *v.* Platt, 134 U. S. 405, 10 Supt. Ct. Rep. 579.

We respectfully submit that this Court should take jurisdiction, grant certiorari, and on review reverse the C.C.A. and reinstate the finding of facts and Decree of the District Court.

Respectfully submitted,

T. J. Wills,
Sol. for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

Gulfport, Mississippi, August 28, 1946.

Chambers of Sidney C. Mize, District Judge; Honorable T. J. Wills, Hattiesburg, Mississippi; Honorable M. M. Roberts, Hattiesburg, Mississippi; Honorable T. C. Hannah, Hattiesburg, Mississippi; Messrs. Watkins & Eager, Standard Life Building, Jackson, Mississippi.

Gentlemen:

I herewith enclose you copy of an opinion I am today signing in the *Newton* case. As you will note I am of the opinion that the sub-partnership was legal under the authorities cited. And that since there was a profit in each one of these partnerships, the Edmonsons were entitled to their share of $104,000.00 but that this was not an adequate consideration for the property conveyed and that therefore, the conveyances will be set aside upon the plaintiff paying the Edmonsons the sum of $104,000.00.

I have given your briefs and the record much study and consideration and must confess that the problem is a difficult one, but after studying it carefully I am thoroughly convinced that the Edmonsons meant no fraud when they entered into the transaction and I do not believe that on the 23rd day of August, or the 6th of October, that Newton know how he stood economically but had begun to be fearful that his status was not good at that time.

I have detailed somewhat at length in my opinion the facts as I found them and you gentlemen may propose a formal finding in accord with the opinion if you so desire.

With kindest regards to all of you, I am

Sincerely,

(S.) S. C. Mize.

No. 232

G. M. McWilliams, *Trustee,*

vs.

F. T. Newton, et al.

This is a suit instituted by the Maryland Casualty Company, et al., for the purpose of setting aside certain conveyances alleged to have been made for the purpose of defrauding creditors; thereafter, F. T. Newton and Mrs. F. T. Newton were adjudged bankrupts, and G. M. McWilliams, Trustee in Bankruptcy, was substituted as plaintiff. The suit was instituted November 5, 1943, and thereafter a supplemental pleading was filed, and since that time the Trustee in Bankruptcy had adopted the pleadings and seeks the relief originally sought by the other plaintiffs.

The conveyances that are attached are dated August 23, 1943, and were executed by F. T. Newton and Mrs. F. T. Newton to Mrs. John B. Edmonson. In addition to the deeds sought to be set aside in an assignment of a certain note and deed of trust executed by Tommy B. Sims to the Newtons, the assignment having been dated September 2, 1943. All of these documents were filed for record in the office of the Chancery Clerk of Forrest County, October 6, 1943. The value of the property conveyed by Newtons to Edmonson was approximately $450,000.00.

Prior to August 23, 1943, Newton and Glenn had been awarded contracts by the Government for the construction of twenty-six Government projects scattered over six states, and the total amounts to be paid for the construction of these projects was approximately $11,000,000.00. Among others were the contracts known as the Camp Campbell contracts in Clarksville, Tennessee, which were awarded by the Government on August 10, 1942, to Newton and Glenn at Rohwer, Arkansas, at and for the sum of $521,045.95. Another one involved herein was the project known as the Greenville, Mississippi, job. In the partnership between Newton and Glenn in the above three projects Newton was interested to the extent of two-thirds and Glenn to the extent of one-third. All the contracts that were taken by the partnership of

Newton and Glenn were assigned to the Planters Bank of Memphis, with the exception of the Greenville, Mississippi, contract. In the Greenville project the Memphis Bank had fifty per cent participation. On March 1, 1943, Glenn sold his entire interest to Newton in all the contracts held by them for the sum of $80,000.00, and the Memphis Bank advanced this sum of money to Newton with which to pay Glenn, and Newton agreed to assume and pay off all of the partnership debts that were owing on that date and Mrs. F. T. Newton guaranteed the payment of the debts.

After the purchase by Newton of the interest of Glenn, Newton procured nineteen of the contracts, totaling the twenty-six. After Newton and Glenn procured the Camp Campbell contract and the Rohwer, Arkansas, contract and the Greenville, Mississippi, contract, Newton entered into a sub-contract with John B. Edmonson and Mrs. John B. Edmonson as to his two-thirds interest in each of these contracts (by the terms of which the Edmonsons were to share in the Camp Campbell contract one-seventh of the profits or losses in Newton's two-thirds interest therein, and a like agreement as to the Greenville contract and to share one-third of the profits or losses of Newton's two-thirds interest in the Rohwer, Arkansas, job).

In August, 1943, Newton's books and records were many months behind and were not properly posted, and he did not know financially just what his condition was. In September and the early part of October he was in conference with the bank officials in Memphis, Tennessee, and advised them that he did not know what his economic status was. He represented to the officials of the bank that he owed sub-contractors approximately $140,000.00, but it later developed as of October 15, 1943, that he owed more than $600,000.00 to sub-contractors. Up until this time Newton probably did not know whether he was solvent or insolvent, but as a matter of fact he was then on October 16, 1943, insolvent.

The Camp Campbell contract and the Greenville contract and the Rohwer, Arkansas, contract were approximately ninety-five per cent complete on August 23, 1943, and each of the projects was profitable. This was shown by an audit of Wooten completed about the 15th of August and

given to Newton. Newton at that time had no thought other than that he was solvent. Under the agreement with the Edmonsons their share of the profits in the three projects amounted to $52,000.00 each, or a total of $104,000.00 for the Edmonsons. The Edmonsons desired settlement of their share in the profits since the jobs were practically completed and the Newtons thereupon agreed to convey to Mrs. Edmonson with the consent of her husband Mr. Edmonson, all the property described in the deeds. Newton at this time did not know that he was insolvent but from his conduct and actions was beginning to anticipate that things were not going just right and rather than call upon the bank to advance $104,000.00 he concluded to convey this property to the Edmonsons in settlement of their share of the profits. The Edmonsons at this time had no information as to the financial condition of Newton but honestly believed that he was solvent and they were acting in good faith at that time. The deed was executed August 23, 1943, and was filed for record October 6, 1943. Between August 23, 1943, and October 16, 1943, Newton was having difficulty in meeting his payroll and was having conferences with the bank officials. On October 16, 1943, the bank declined to advance any further money for meeting the payrolls unless Newton would give additional security to the bank. Newton declined to do this; thereupon the bank refused to advance any money, and soon thereafter Newton defaulted and the Government took over the contracts to be completed. The remaining contracts were completed, leaving Newton owing creditors to the extent of approximately $2,000,000.00.

The contract for the work at Brunswick, Georgia, was for $2,869,989.00 and was awarded July 24, 1943, approximately one month before the date of the conveyances. This contract, like the others, was assigned to the Memphis Bank and at the time that Newton made the deeds to the Edmonsons in August, the bank had advanced approximately $150,000.00 on this Brunswick project. As late as July 25, 1943, the bank was urging Newton to keep in behind the engineers and have their estimates go forward so that the government checks would come into the bank. At this date it is not believed that Newton had any thought of being insolvent, and not until some time about the early part

of October did the bank feel its insecurity. It had advanced at the time of the default about $2,033,151.64. The bank on that date declined to advance the payroll, and of course, the default followed. The contracts held by Newton and by Newton and by Glenn then undertook to do everything he could to hide, secrete, divert, and transfer any monies, bonds or properties that he possessed, and thereafter from time to time shifted it from one place to another and was hopelessly insolvent.

The question presented by this record is what were the rights of the Edmonsons as of August 23, 1943, by virtue of a conveyance made on that date and recorded on October 6th. The rights of the Edmonsons grew out of the three contracts with the Newtons, one of which was dated April 6, 1942, and recorded in the office of the Chancery Clerk of Forrest County on the 8th of June, 1942, and the second contract dated June, 1942, and the third contract dated August, 1942, and all of same being similar, and which contracts are found at page 575 et seq. These documents purported to form a sub-partnership, into which said sub-partnership none of the parties contributed any actual capital. Newton himself contributed no capital, but Newton was contractor and had valuable equipment with which he and Glenn as partners were to perform these various contracts with the Government. The Edmonsons and other sub-partners in one of the contracts assumed obligations that would have been binding had there been a loss instead of a profit. The contract as between the parties was valid and if there had been a loss, the Edmonsons could have been called upon to contribute their proportion of the losses, as each one of them owned property. By the terms of the contract these sub-partners were bound and gave almost unlimited power by its terms to Newton to bind them. Each contract was limited to each project therein mentioned; as between the parties, this is legitimate and creates a sub-partnership, that is to say, a partnership in the particular interest of a member of a general partnership, *Corpus Juris* 47, page 715. By this relationship a sub-partner becomes liable for the debts as to that particular project of the partner with whom they are sub-partners, but of course the sub-partner has no rights of

the partner in the business of the general partnership. He is liable only for the debts of the sub-partnership.

These contracts of sub-partnership were entered into in good faith at a time when Newton was abundantly solvent and had the prospects of probably $2,000,000.00 profits. These sub-contracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted, and at that time there was no thought in the minds of any of the parties of delaying or hindering any creditors in the payment of his claims. The Edmonsons had no control as a matter of right under the general contracts obtained by the partnership of Newton and Glenn and no control over the sub-partnership contract other than to assume obligations for losses and conferences among the partners, Newton having general authority and control as to the sub-partnership. At the time of the conveyances on August 22, 1943, the Edmonsons had no intent to hinder, delay, or defraud Newton's creditors and had no knowledge at that time that Newton was suspicious of his financial condition. The Edmonsons were acting in good faith in believing that they were entitled to either the sum of $104,000.00 as their share of the profits of the three jobs, or that they were entitled to the property offered them in settlement of their profits from the three jobs. The Newtons, however, were then not acting in the best of faith; they were suspicious, judging from their conduct soon thereafter and from the difference in settlement and from the difference in the amount due the Edmonsons and the value of the property conveyed. There was in their mind at that time an intent to prefer the Edmonsons over their other creditors in the event a crash should come. The Newtons did not know on August 23, 1943, that a crash was coming, but they were fearful that it might and were therefore undertaking to prefer the Edmonsons in the event it did come and to place their property in the hands of others so as to delay their creditors. At that time they had no intent to defraud.

The audit of Wooton on these three projects was given to the Edmonsons and Newtons on the 15th of August and showed their share of the profits to be $104,000.00, and the Edmonsons were anxious to receive their money and were

demanding of Newton that he settle with them; thereupon, the purported settlement was made on August 23, 1943. There are considerable circumstances tending to show that the deed was not executed on August 23rd and it is strongly urged upon the Court that the deed was back-dated. The circumstances surrounding the execution of the deed were gone into at great length, but the testimony is insufficient to overthrow the presumption of the acknowledgment by the Notary Public and the testimony of the Newtons and Edmonsons that it was actually executed on the 23rd of August. The original deed shows plainly that it was drawn to be executed in either September or October, but there seems to be no attempt to conceal on the face of the deed that this was erased and the word August written in pen and ink. The testimony of Newton as to his movements about that particular time is somewhat improbable but not at all impossible. I am of the opinion, however, that the date is rather immaterial, other than for the purpose of weighing evidence, as undoubtedly the rights of the parties will be governed by the date of October 6, the day the deed was filed for record. Newton was insolvent on October 6 but did not know it. On that date he had no real idea of his financial condition. His books were two or three months behind with postings. Some of his help was undoubtedly incompetent or overworked and it is a matter of common knowledge that at that time there was a great crisis and it was very difficult to obtain sufficient and competent help. Not until October 16 did Newton really know that he was insolvent. Thereafter, of course, many acts were committed indicating and evidencing an intent on the part of Newton to put his property which had already not been conveyed beyond the reach of his creditors. He converted all of his bonds into cash, withdrew cash from the banks, and there were many badges of fraud but none of these point with any reasonable degree of certainty to the Edmonsons.

As a matter of law, fraud must be proved by clear and convincing evidence and is never presumed. It is well settled in Mississippi, however, that where the fraudulent intent of the grantor is shown, then the burden of proof shifts to the grantee to show that he was acting in good faith.

Under the facts hereinbefore found and it appearing that the Edmonsons were guilty of no intent to defraud but were purchasers without notice for a valuable consideration under a conveyance in which the consideration was inadequate, the law in Mississippi and under the Bankruptcy Act is to the same effect, that is to say, the conveyance should be set aside upon the plaintiff, trustee in bankruptcy paying to Mrs. Edmonson for the benefit of herself and Mr. Edmonson the sum of $140,000.00. This is true under the common law, 27 :CJ :344. Under the bankruptcy act the consideration is required to be the present fair equivalent value of the property conveyed. The act, however, provides that such bona fide purchaser who without actual fraudulent intent was given a consideration less than fair for such property may retain the property as security for repayment, U. S. C. A. Title 11, Section 107 (d) 6. A decree may therefore be drawn setting aside all the conveyances to the Edmonsons upon the payment by the trustee, the plaintiff, to them of the sum of $104,000.00.

A different situation arises, however, as to the conveyance to J. B. de Vilentroy, as the testimony is clear and convincing that he had knowledge of the insolvency of Newton, and the conveyances were made without consideration and with intent to hinder, delay, and defraud creditors. Likewise, the trustee is entitled to recover the sum of $22,000.00 from him, which was paid within the four months prior to November 3, 1943. A decree may be drawn in accordance with this opinion and submitted to me for signing.

Dated this the 28th day of August, 1946.

(S.) S. C. Mize,
U. S. District Judge.

No. 232

G. M. McWilliams, *Trustee,*

vs.

F. T. Newton, et al.

Decree

This day this cause came on before the Court to be heard, and the Court having before it the pleadings in said cause and all of the evidence, both documentary and oral, and having heard the arguments of counsel, and having taken said cause under advisement doth now find as follows:

That the defendant, Mrs. J. B. Edmonson and her husband were sub-partners with F. T. Newton in three (3) Government contracts in which their interest amounted to One-Seventh (1/7) of Newton's Two-Thirds (2/3) interest in the Camp Campbell and Greenville Air Base jobs, and two-thirds (2/3) interest in Rohwer, Arkansas Recreation Center. That the sub-partnership agreements were legal and gave to the said Mrs. J. B. Edmonson and her husband the indicated ownership therein with rights of partners to share in the profits and losses accruing therefrom.

The Court further finds that all of the projects made profits and that the total profits arising therefrom, to the Edmonsons, amounted to One Hundred Four Thousand and Ninety-Nine Dollars and Fifty-Eight Cents ($104,099.58) as shown by the audit made on August 15, 1943. That on August 23, 1943, F. T. Newton and Mrs. F. T. Newton conveyed the property shown by the three (3) deeds in this record bearing the date of August 23, 1943, to Mrs. J. B. Edmonson in settlement for the One Hundred and Four Thousand and Ninety-Nine Dollars and Fifty-Eight Cents ($104,099.58) share of profits coming to them. There was an indebtedness on the property so conveyed of Eighty-Five Thousand and No/100 Dollars ($85,000.00), the payment of which was assumed by the Edmonsons. There was transferred also a Note secured by a Deed of Trust of Tommy B. Sims for Two Thousand Five Hundred and

No/100 Dollars ($2,500.00) in addition to the property so conveyed.

The Court further finds that the property so conveyed was worth Four Hundred and Fifty Thousand and No/100 Dollars ($450,000.00) and the amount paid was less than a fair equivalent value, but that the purchase was made without actual fraudulent intent on the part of Mrs. J. B. Edmonson, but in good faith, and that she is entitled under Section Sixty-Seven (67) Paragraph (6) of the Bankrupt Act to be paid the One Hundred and Four Thousand and Ninety-Nine Dollars and Fifty-Eight cents ($104,099.58) and to then reconvey the property to the Trustee in Bankruptcy for Mr. & Mrs. F. T. Newton. That the Sims note heretofore referred to should be surrendered to the said Trustee, G. M. McWilliams.

It is therefore ordered that upon the payment to Mrs. J. B. Edmonson, the sum of One Hundred and Four Thousand and Ninety-Nine Dollars and Fifty-Eight Cents ($104,099.58) by the Trustee in Bankruptcy, that she execute a Deed to him, the said G. M. McWilliams, Trustee, or his successor in said position, conveying all the property described in the two (2) Deeds of F. T. Newton to Mrs. J. B. Edmonson dated August 23, 1943; and that she surrender forthwith the Sims Note and Deed of Trust to the said Trustee, G. M. McWilliams.

It is further ordered that the costs of this suit be taxed against the Plaintiffs herein, and the receiver in this cause is directed to pay said costs from the funds accumulated in his hands.

Done, Ordered and Decreed this September 4th, 1946.

(S.) S. C. Mize,
District Judge.

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11905

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. NEWTON and MRS. F. T. NEWTON, Bankrupts, *Appellant,*

versus

MRS. JOHN B. EDMONSON, *Appellee*

Appeal from the District Court of the United States for the Southern District of Mississippi.

(June 23, 1947)

Before Hutcheson, Waller, and Lee, Circuit Judges

HUTCHESON, *Circuit Judge:*

The matters for determination here had their rise in transfers of a large number of pieces of real and personal property, purportedly made on August 25, 1943, but recorded October 6, 1943, by F. T. Newton, a government contractor, and his wife to Mrs. Edmonson.

On November 4, 1943, the Maryland Casualty Company, surety on Newton's contractor's bond, filed suit against the Newtons, Mrs. Edmonson, and others to set these transfers aside, as fraudulent, and, carrying in its wake the appointment of a receiver for the Newtons, a determination that the transfers constituted acts of bankruptcy on their part, and their adjudication as bankrupts,[1] the controversy has since continued.

On March 23, 1946, defendants, the Newtons and Edmonsons, filed an answer to the intervention. In it, denying, as they had done in the bankruptcy proceedings, that the conveyances were fraudulent or in anywise impeachable, they put forward the theory on which they in part prevailed

[1] Newton v. Glenn, 149 Fed (2) 879.

below, that Mr. and Mrs. Edmonson were sub-partners with Newton as to three of his contracts which were profitable and that the transfers were made to them in satisfaction of their distributive share of the profits from these contracts.

The district judge found: that the Edmonsons were sub-partners in the three contracts named; that these contracts were profitable; that the Edmonsons' share of these profits were $104,000.00; that in taking the conveyances in satisfaction of their profit interest, they had no intention to defraud but acted in good faith; and that they were, therefore, bona fide purchasers; but that the properties transferred were worth $450,000.00, and the amount paid was less than their fair equitable value. Concluding from these findings that Mrs. Edmonson was a purchaser "who without actual fraudulent intent has given a consideration less than fair, as defined in Subd. (d)[2] for such transfers," that "she may retain the property * * * as security for repayment," he gave judgment accordingly. This appeal is from that decree.

Appellant is here with briefs and oral arguments surcharged with the feeling and the accusation that the whole sub-partnership theory on which the case went off below was conceived in sin, born in iniquity and "rocked in the cradle of chicanery, subterfuge and fraud." He insists that the gaze of the district judge was so foreshortened by his preoccupation with the legal niceties of the sub-partnership theory that he could not or would not see the case in its true perspective. He urges upon us that (a) there was no proof of a valid sub-partnership here, (b) if there was, nothing was due the Edmonsons under it, and (c) the case is one simply of a common fraud and should be so decided. Appellee, putting her whole reliance, as indeed she must, on the sub-partnership theory, devotes the major portion of her brief to a discussion of sub-partnerships in particular.

A reading of the briefs and a consideration of the case made by the record makes it quite plain that here, as was the case in *Guy* v. *Donald*, 203 U. S. 399, the questions for decision "go beyond the question of the existence of a partnership." Briefs and record make it quite clear, too, that this is a case, as that one was, where "As long as the matter

to be considered is debated in artificial terms, there is danger of being led by technical definitions to apply a certain name and then to deduce consequences which have no relation to the grounds on which the name was applied." id. at 406. As the court did there, we shall, in order to arrive at a right decision, declining to "debate in artificial terms" "the matter to be considered," decide the case by setting out its substance.

On August 14, 1943, Newton, a contractor, with uncompleted government contracts totaling very large sums, all of them financed through, and assigned to, the Union Planters National Bank and Trust Company of Memphis, Tennessee, owed the bank on account of them approximately $1,500,000.00. On that date Newton made two deeds, each covering the same, and Mrs. Newton made one deed covering other property, to Mrs. Edmonson, Mrs. Newton's sister. These deeds for a recited consideration of $10.00 and other good and valuable consideration, conveyed to her all the property they owned in Mississippi, except their homestead, property which the Newtons in their business statements had valued at $451,000.00, and thus stripped the Newtons and their business of every asset which when they made their banking arrangements they had held themselves out as having.

So gross was this act of nepotism, so conclusive of a fraudulent purpose on the part of the Newtons to delay, hinder and defeat their creditors, that the district judge in the bankruptcy proceedings found as matter of law and in these proceedings as matter of fact that the conveyances were in fraud of Newtons' creditors. When it came, however, to setting them aside as to Mrs. Edmonson, he declined to do so because, though he found that the properties were worth greatly in excess of the $104,000.00 they claimed as due and they were entitled only to hold them as security until that amount was paid them, he found also that they had sustained their burden of showing that in respect of the transfers they were bona fide purchasers without knowledge of Newton's insolvency and without an intent to defraud. In so holding the district court made findings of fact which are clearly erroneous and must be set aside.

If we could agree with him that the so-called sub-partner-

ship agreements were effective to give the Edmonsons an enforceable interest in the profits from the government contracts they dealt with, we still could not agree with his conclusion that, in this controversy between the creditors of Newton and his wife on one side and his wfie's sister on the other, appellee had sustained the burden of showing that there were profits to which she was entitled as between her and Newton, we could not agree that in joining with the Newtons to strip them of their property she acted in good faith and without intent to defraud their creditors.

The three contracts on which Mrs. Edmonson relies as giving her an interest in Newton's ventures are identical in their terms. One deals with the Camp Campbell, one with the Greenville, one the Rohwer contract. Reciting that Newton and Glenn are engaged in the general contracting business, Newton owning two-thirds, and Glenn one-third, that they have entered into a new contract and "it is necessary for the said Newton to acquire additional capital for the construction of said work in order to take the same," each then provides as to the seven persons named, including Newton and Mrs. Edmonson, that each of said parties is to share "for the capital invested equally in the two-thirds interest of Newton, that is to say, each of said parties is to contribute one-seventh of the losses of the two-thirds interest and is to share one-seventh of the profits," not of the general contracting business but of the particular contract named. Each gives Newton full power to conduct the construction and carry out the contract, and to act with reference to it as if he were the sole owner of it. Each declares that the six parties named are the silent partners of Newton and Glenn, and that all of the work is to be carried out in the name of Newton and Glenn, all records and accounts shall be kept in the firm name of Newton and Glenn, and that Newton is authorized to bind all of the parties by any act that he may do. The evidence is undisputed that the Edmonsons furnished no capital and no services, and that Newton assigned the three contracts, in which Mrs. Edmonson claimed an interest, together with others, to the bank to secure any and all of his obligations to it, and that the whole proceeds of the contracts were paid to the bank.

Matters standing thus, we think it perfectly clear that the instruments relied on did not constitute binding obligations on the part of Newton to pay the Edmonsons anything, first, because by express provisions they were to share in consideration of the capital advanced, and they advanced no capital, second, because wholly without consideration and merely promises to make gifts, the Edmonsons did not and could not have any title to or interest in the profits until they were realized and actually paid over to them. Under this agreement, Newton was to manage the business as though it were his own, and with their full authority, he assigned the contracts to the bank. In a contest with Newton's creditors, including the bank, over Newton's property, Mrs. Edmonson is without standing to claim that she was a creditor of Newton to the extent of her share of the profits from the contracts and therefore a bona fide purchaser.

Further, if mistaken in this and the contracts were valid and enforceable obligations upon Newton to pay the Edmonsons their share of the profits, we think it quite clear that the record, with its showing of inconsistent claims and actions on the part of the Edmonsons and the Newtons, and its general deficiencies, is wholly insufficient to support a definite finding that upon a proper accounting, profits were or would have been due the Edmonsons in the amount they claim.

Finally, the invoked section of the Bankruptcy Act, Section 107 (d) has, and can have, no application to transactions and performances of the kind the record shows took place here. The statute deals with and protects substantial claims of persons who have dealt in fairness and good faith and who, because they have done so, are entitled to equitable protection. It has no application to nepotic and fictitious arrangements of this kind entered into by members of a debtor's family to defeat creditors while keeping the property safely in the family. Hastily put forward and as hastily pressed to a conclusion by Newton and his wife when, their troubles mounting, they were tottering to their fall, the record leaves in no doubt that the plan of conveying their properties to Mrs. Newton's sister was as ineffective as it was disingenuous, as futile as it was false and faithless to

their creditors. The very fact that the Newtons placed in the protective custody of Mrs. Edmonson every piece of property that Newton owned at a time when, on the undisputed evidence, they knew that he was hard up for money and that his affairs were involved, completely refutes as matter of law the claim that the transfers were taken bona fide and that the transferees are entitled to protection. The statute has no such function. It cannot be given such operation. There was no basis in the evidence for the judgment. It is reversed and the cause is remanded with directions to set the transfers aside and to deny the Edmonson claim.

(2176)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. NEWTON and MRS. F. T. NEWTON, Bankrupts

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AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Horace C. Wilkinson,
Of Counsel for Petitioner.

Wilkinson & Skinner,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to permission granted by order made by the Honorable Hugo L. Black, an Associate Justice of this Honorable Court on the 5th day of September, 1947, your petitioner, Mrs. John B. Edmonson, files this amended petition for writ of certiorari and respectfully petitions for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit (G. M. McWilliams, trustee in bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts, Appellants v. Mrs. John B.

Edmonson, Appellee, No. 11905) rendered on June 23, 1947. Application for rehearing denied on the 17th day of July, 1947. Such decision reversed a decree of the District Court of the United States for the Southern District of the State of Mississippi, Hattiesburg Division.

The opinion of the District Court is printed as Appendix A and the opinion of the Circuit Court of Appeals is printed as Appendix B to the brief filed by Honorable T. J. Wills in support of the petition for a writ of certiorari.

Summary Statement of Matter Involved

This case involves the validity of three written contracts made by F. T. Newton with Mr. and Mrs. John B. Edmonson and the validity of two deeds executed by Newton to Mrs. Edmonson on the 23rd day of August, 1943 in settlement of Newton's liability under the aforesaid contracts to Mr. and Mrs. Edmonson.

The Maryland Casualty Company and National Surety Company, as creditors of Newton, instituted a suit in the District Court on November 5th, 1943, for the purpose of setting aside the deeds which it is alleged were made for the purpose of hindering, delaying or defrauding the creditors of Newton.

Thereafter, and on, to-wit, the 31st day of August, 1944, Newton and his wife were adjudged bankrupts and G. M. McWilliams, trustee in bankruptcy, was substituted as plaintiff. The suit was instituted November 5th, 1943, and thereafter supplemental pleadings were filed and since that time the trustee in bankruptcy adopted the pleadings and sought the relief originally sought by the other plaintiffs. This case was numbered 11905 in the Circuit Court of Appeals. The transcript of the record consists of two printed volumes. Incorporated in those volumes by adoption are the three volumes of the transcript of the record in case No. 11306 in the Circuit Court of Appeals which was the case

in which the Newtons were adjudged bankrupts, 149 F. (2d) 87, Certiorari denied in this Court, 326 U. S. 758.

We will refer to the bankruptcy records as "BR" and the record in the case against Mrs. Edmonson as "ER" indicating bankruptcy record and Edmonson record respectively.

The District Court decreed that the property acquired by Mrs. Edmonson under the deeds above referred to was acquired without actual fraudulent intent on her part and in good faith and that she was entitled under Section 67, par. D (6) of the Bankruptcy Act (Title 11, 1946 pocket part U. S. C. A., bottom page 75) to be paid $104,099.58 and the Court ordered that upon payment to her of said sum by the trustee in bankruptcy, that she execute a deed to him to the property that was conveyed to her in the said deeds.

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause with directions to set aside the transfer and to deny the claim of the Edmonsons. As a result, the Edmonsons are out $104,099.58.

Mrs. Edmonson's rights originated in certain writings called contracts for the construction of three projects that Newton and Glenn agreed to construct for the government and three writings executed by Newton and Mr. and Mrs. Edmonson which we will refer to as participating contracts.

The question presented by the record was well stated by the District Judge in his opinion wherein he said:

> "The question presented by this record is what were the rights of the Edmonsons as of August 23, 1943, by virtue of a conveyance made on that date and recorded on October 6." Er. 924.

In 1940, Newton and Glenn formed a partnership to do general contracting. Newton was two-thirds owner, Glenn one-third owner (Br. 203). They made three contracts with the government in March, June and August, 1942, for con-

struction of projects at Camp Campbell, Greenville, Mississippi, and Rohwer, Arkansas.

All monies due or to become due under the Camp Campbell and Rohwer contracts was assigned to the Union Planters National Bank and Trust Company of Memphis, Tennessee, hereinafter referred to as the "Memphis Bank" in April and August, 1942.

The money due or to become due under the Greenville contract was assigned to the Deposit Guaranty Bank and Trust Company of Jackson, Mississippi, hereinafter referred to as the "Jackson Bank" (Br. 314-317).

In April and August, 1942, Newton made a contract with six of his blood or marriage relatives, including Mr. and Mrs. Edmonson, whereby Newton and his relatives were to pay one-seventh of the losses and receive one-seventh of the profits on the Camp Campbell and Rohwer jobs (Br. 575, 582) (Er. 216, 221, 225).

In June, 1942, a like contract was made between Newton and Mr. and Mrs. Edmonson whereby Newton and Mr. and Mrs. Edmonson were each to pay two-ninths of the losses and receive two-ninths of the profits on the Greenville job (Br. 579) (Er. 933).

The first contract providing for participating in Newton's interest in the Camp Campbell contract was filed for record on the 8th day of June, 1942 in Forrest County, Mississippi, where the parties resided.

In March, 1943, Glenn withdrew and sold his interest in the partnership of Newton and Glenn to Newton for $80,000.00 (Br. 182).

Mr. and Mrs. Edmonsons' share of the profits on the three jobs was $104,099.58 (Br. 1174), (Er. 86, 933).

The government paid the contract price to the banks under the assignments less a balance of approximately $10,000.00 on the Camp Campbell job.

Instead of accounting to the Edmonsons for their share of the profits when the money was received, Newton used their share of the profits in his general contracting business.

On August 23, 1943, Newton deeded Mrs. Edmonson all of the real estate he owned except his homestead in settlement of the Edmonsons' claim (Er. 102, 115, 126).

The real estate was valued at $450,000.00. The Edmonsons assumed incumbrances on the real estate of $85,000.00.

The Petition in Bankruptcy against the Newtons was filed November 3, 1943 (Br. 8), and they were adjudicated bankrupts August 31, 1944 (Br. 1653).

The trustee in bankruptcy prosecuted the proceedings in the District Court to set aside the transfer of the real estate to Mrs. Edmonson.

The District Judge made a finding of fact in which he said:

> "Under the agreement with the Edmonsons, their share of the profits in the three projects amounted to $52,000.00 each or a total of $104,000.00 for the Edmonsons. The Edmonsons desired settlement of their share in the profits since the jobs were practically completed and the Newtons thereupon agreed to convey to Mrs. Edmonson, with the consent of her husband, Mr. Edmonson, all the property described in the deeds. Newton at this time did not know that he was insolvent but from his actions was beginning to anticipate that things were not going just right and rather than call upon the bank to advance $104,000.00, he concluded to convey this property to the Edmonsons in settlement of their share of the profits. The Edmonsons at this time had no information as to the financial condition of Newton but honestly believed that he was solvent and that they were acting in good faith at this time." Er. 923.

The Circuit Court of Appeals reversed the order of the District Court. It held:

1. That the 1942 contracts between the Newtons and the Edmonsons were not effective to give Mrs. Edmonson an

enforceable interest in the profits from the government contracts they dealt with.

2. That the instruments relied on did not constitute binding obligations on the part of Newton to pay to the Edmonsons anything.

3. That they were wholly without consideration and merely promises to make gifts.

4. That Mrs. Edmonson did not sustain the burden of showing that there were profits to which she was entitled.

5. That the transfers were not taken bona fide and therefore the Bankrupt Act, Sec. 67, Par. D. (6) has and can have no application to the transaction between Newton and the Edmonsons.

Statement as to Jurisdiction

This case is one over which the Court has jurisdiction under the provisions of Title 28, Sec. 347, U. S. C. A. and Title 11, Sec. 47, U. S. C. A., 1946 Supp. p. 210.

Questions Presented

The following questions, raised and argued before and passed upon by the Circuit Court of Appeals, are involved in the present petition for certiorari and review:

1. The Edmonsons had a good and valid claim for $104,000 against Newton at the time the deeds in question were executed.

2. The three participating contracts were each supported by a valid, lawful consideration.

3. The deeds following the contracts were each supported by a valid, legal consideration.

4. Newton was not indebted to the Memphis Bank in the sum of approximately $1,500,000.00 at the time the deeds in

question were executed. The amount of the Bank's liability to Newton on said date was expressly reserved.

5. Mrs. Edmonson had no intention of defrauding the creditors of Newton on August 23, 1943, and the Circuit Court of Appeals disregarded the purpose and meaning of Rule 52-A in holding to the contrary.

6. Mrs. Edmonson is entitled to the benefit of U. S. C. A., Title II, Section 107 (d) and Sec. 67 (d) (6), Title II, 1946, pocket part, U. S. C. A., page 75.

Reasons Relied On for Allowance of Writ

1. The holding of the Circuit Court of Appeals to the effect that the instruments relied on did not constitute binding obligations on the part of Newton to account to the Edmonsons for anything is contrary to *Burnet* v. *Leininger*, 285 U. S. 136, as well as the rule supported by eminent authority that an agreement to pay another a portion of profits received from a joint enterprise must account to him.

2. The holding of the Circuit Court of Appeals that the contract between Newton and Mr. and Mrs. Edmonson was wholly without consideration and constituted merely promises to make gifts to the Edmonsons is contrary to *Storm* v. *U. S.*, 94 U. S. 76, and other authorities.

3. The holding of the Circuit Court of Appeals that the deeds from Newton to Mrs. Edmonson were not supported by a valid, legal consideration was a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

4. The Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, when it set aside the findings of fact of the District Judge

who saw and heard the witnesses and the decree entered thereon without sufficient facts in the record to support such action.

5. The Circuit Court of Appeals in holding that Section 107 (d) of the Bankruptcy Act was not applicable to this cause and that Mrs. Edmonson was not entitled to the benefit of that Section decided an important question of Federal law, which has not been but should be settled by this Court or decided a Federal question in a way conflicting with applicable decisions of this Court.

WHEREFORE, Your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, commanding him to certify and send to this Court for review and determination, on the day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 11905 in the United States Circuit Court of Appeals for the Fifth Circuit, entitled G. M. McWilliams, trustee in bankruptcy of F. T. Newton and Mrs. F. T. Newton, bankrupts, appellants, v. Mrs. John B. Edmonson, appellee, and that the judgment of the said Circuit Court of Appeals may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioner will ever pray.

WILKINSON & SKINNER,
608 Farley Building,
Birmingham 3, Alabama,
Attorneys for Petitioner.

HORACE C. WILKINSON,
608 Farley Building,
Birmingham 3, Alabama,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS.

BRIEF AND ARGUMENT IN SUPPORT OF THE AMENDED PETITION FOR CERTIORARI

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit's application is printed in Appendix B to the brief filed in this cause by Honorable T. J. Wills in support of the Petition for Writ of Certiorari. Rehearing was denied on the 17th day of July 1947.

Jurisdiction

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Statement of the Case

The statement of the case appears in the petition and amended petition for a writ of certiorari and is incorporated herein by reference. Such facts as are relevant are set forth in such statement and in the arguments that follow.

Specification of Errors

The United States Circuit Court of Appeals for the Fifth Circuit erred in the following respects:

1. In holding that the 1942 contracts between the Newtons and the Edmonsons were not effective to give Mrs. Edmonson an enforceable interest in the profits from the government contracts they dealt with.

2. In holding that the instruments relied on did not constitute binding obligations on the part of Newton to pay to the Edmonsons anything.

3. In holding that they were wholly without consideration and merely promises to make gifts.

4. In holding that Mrs. Edmonson did not sustain the burden of showing that there were profits to which she was entitled.

5. In holding that the transfers were not taken bona fide and therefore the Bankruptcy Act, Sec. 67, Par. D (6) has and can have no application to the transaction between Newton and the Edmonsons.

ARGUMENT

May it please the Court:

We have not referred to a number of matters that transpired subsequent to October 16, 1943, which subjected the Newtons to criticism.

Mrs. Edmonson's rights must be determined by the situation as it was at the time the deeds were executed and delivered on August 23, 1943.

Any sum justly due her at that time is not to be wiped out by any mistake she or her husband or Newton may have made some 60 days later.

We submit three propositions, fully supported by the record, which require a reversal of the order of the Circuit Court of Appeals.

1. The Edmonsons had a valid claim against Newton for $104,099.58 at the time the deeds in question were executed.

2. Newton did not owe the Memphis Bank approximately $1,500,000.00 at the time the deeds in question were executed.

3. Mrs. Edmonson had no intention of defrauding Newton's creditors at the time the deeds in question were executed.

We will discuss the propositions in the order named:

Proposition I

The participating contracts between Newton and the Edmonsons were valid contracts supported by a valuable consideration and created a binding obligation on the part of Newton to account to the Edmonsons for the agreed share of the profits.

A

The three contracts between Newton and the Edmonsons were valid and constituted either (1) An equitable assignment or (2) a subpartnership or (3) a joint adventure.

1. Equitable assignment.

In a case where the husband who was a member of a partnership agreed with his wife that she should be an

equal partner with him in his interest with the company and should share equally with him the profits and losses, this court held:

> "The agreement did not make the wife a member of the partnership without the consent of the other partners, but amounted at most to an equitable assignment of one half of what her husband should receive from the partnership, she in turn agreeing to make good to him one half of the losses he might sustain by reason of his membership in the firm."
>
> *Burnet* v. *Leininger*, 285 U. S. 136, 8 C. J. S. 752-753.

2. A sub-partnership.

> "A contract of subpartnership is an agreement between a partner and a third person by which the latter is to share in the profits, or profits and losses, of the partner with whom the contract is made. The manner in which the profits are to be divided is immaterial. The subpartners are partners inter se, but, in the absence of the mutual assent of all the parties, a subpartner does not become a member of the partnership."
>
> 47 C. J. S. p. 715, Sec. 112.
> 40 A. J. p. 135, Sec. 14.

3. A joint adventure.

> "A contract by which, for a consideration of one dollar and services rendered in the completion of a logging transaction, one party is to receive a share of the profits secured by the other, who is to finance the enterprise, creates a joint adventure."
>
> * * * * * * *
>
> "One contracting to pay another a portion of the profits received from a joint enterprise must account to him"
>
> *Elliott* v. *Murphy Timber Co.*, 244 Pac. 91, 48 A. L. R. 1043.

Viewed as an equitable assignment, sub-partnership or a joint adventure, the three contracts executed by Newton and the Edmonsons gave them an equity in Newton's interest in the contracts with the government that the participation agreements dealt with that was not forfeited by any conduct on the part of the Edmonson's criticized by the Court of Appeals. To deny any obligation on Newton to account to the Edmonsons for the profit made on the three jobs is to arbitrarily deprive them of their property—conduct as fatal to the administration of justice as debate in artificial terms.

B

The three contracts were each supported by a valid lawful consideration.

The promise of Mr. and Mrs. Edmonson to contribute one-seventh of the losses and the promise of Newton to pay one-seventh of the profits created a valid and binding contract.

> "A promise by one party is sufficient consideration for a promise by the adverse party."
> 12 *Am. Jur.*, p. 606.
> *Storm* v. *U. S.*, 94 U. S. 76.

> "Where a contract provides as this does, for payment by one party to another of profits received, it is the duty of the one receiving such profits to account to the other, for otherwise there would be no way by which such party could determine whether there were any profits. The duty to account arises whenever one party is in possession of the profits to which another person is entitled to share, and regardless of what their relationship may have been at the time the profits were earned."
> *Elliott* v. *Murphy Timber Co.*, 244 Pac. 91, 48 A. L. R. 1043.

In view of the rule announced in the authority cited, the Court of Appeals holding that:

> "The Edmonsons did not and could not have any title to or interest in the profits until they were realized and actually paid over to them",

is manifestly erroneous.

The Edmonsons had an equitable interest in the profits from the time they were earned by virtue of the contract under which they were entitled to a share in said profits.

The objection that the Edmonsons advanced no capital is without merit. Neither Newton nor Glenn advanced any capital. The Edmonsons obligated themselves to pay a specified portion of any losses that resulted from the execution of the contracts. They were solvent and could have been required to carry out their agreement.

> "Whatever will constitute a consideration in the case of other contracts, will likewise constitute a consideration in the case of a partnership agreement. So the partnership agreement will be supported by the mutual covenants and promises of the co-partners such as their mutual agreement to contribute capital to the partnership enterprise, or to contribute services or capital in exchange for services, or assume the risks and liabilities attached to the relationship."
>
> 47 *C. J.*, p. 54, Sec. 46.

Nor can it be truthfully said that the participating contracts were wholly without consideration and merely promises to make gifts. A valuable consideration has a well understood meaning that is recognized by text writers and appellate courts.

> "A very slight advantage to one party or a trifling inconvenience to the other is a sufficient consideration to support a contract when made by a person of good capacity, who is not at the time under the influence of any fraud, imposition or mistake. Traphagen's Ex'r

v. Voorhees, 44 N. J. Ed. 21, 31, 12 A. 895. Whatever consideration a promisor assents to as the price of his promise is legally sufficient consideration. Legal sufficiency does not depend upon the comparative economic value of the consideration and of what is promised in return. 1 Contracts A. L. I. Sec. 76, 81."

Coast National Bank v. *Bloom.*, 95 A. L. R. 532, 174 A. 576.

C

The deeds following the contracts were each supported by a valid legal consideration.

(1) "A preexisting debt is ordinarily considered a good and sufficient consideration for a conveyance."

37 *C. J. S.*, p. 974, Sec. 155.

(2) So is a contingent liability.

"A contingent debt or liability may be a sufficient consideration for a conveyance by a debtor."

37 *C. J. S.*, p. 1068, Text 51, 58.

(3) So is a liability incurred by the grantee at the request of the grantor.

Elliott v. *Murphy Timber Co. supra*, 17 *C. J. S.*, p. 431, Sec. 81.

(4) So if the promisee foregoes some advantage or profit or parts with a right which he might otherwise exert.

"There is sufficient consideration for a promise if the promisee foregoes some advantage or benefit or parts with a right which he might otherwise exert."

12 *Am. Jur.*, p. 576, Sec. 81.

(5) So for the consideration of a waiver of a right of forebearance to exercise the same.

"The waiver of a right or forebearance to exercise the same is a sufficient consideration for a promise made on account of it."

Contracts, 13 *C. J.*, p. 342, Sec. 193.

The authorities cited conclusively and incontestably show that the participating contracts were valid contracts supported by a valuable consideration and created a binding obligation on the part of Newton to account to the Edmonsons for the agreed share of the profits.

PROPOSITION II

Newton did not owe the Memphis Bank approximately $1,500,000.00 at the time the deeds in question were executed and delivered to Mrs. Edmonson.

We most respectfully submit that the Circuit Court of Appeals erred in the following statement found on page 4 of its printed opinion:

> "On August 14, 1943, Newton, a contractor, with uncompleted government contracts totaling very large sums, all of them financed through and assigned to the Union Planters National Bank and Trust Company of Memphis, Tennessee, owed the bank on account of them approximately $1,500,000.00."

It is our contention that the record in this case not only fails to support the quoted statement but it goes further and affirmatively shows that said statement is positively erroneous for the following reasons:

A

The record affirmatively shows the question of the bank's liability to Newton in the amount thereof expressly reserved for future determination by the District Court. Whether the bank owed Newton or Newton owed the bank at the time the deeds in question were executed cannot be determined from this record because all of the facts with respect to their relations are not before the Court. It may may well be that the bank owes Newton more than Newton

owes the bank. The District Court did not undertake to decide that question. On the contrary, a decision of that question was expressly reserved for future consideration.

In the bankruptcy proceeding counsel for the petitioning creditors strenuously insisted that the Memphis Bank was not a party to the litigation. (BR 1536).

Mr. Hannah insisted that the letter of July 24, 1943, did not of itself make a contract and that before Mr. Newton could assert a claim upon or under that letter, he must first introduce evidence to prove that the bank did not set up the line of credit of $1,500,000.00 and that he must offer evidence to show the meaning of the term, "subject to the usual credit reservation" before the court could determine that the letter constituted a commitment to furnish money to Mr. Newton. (BR 1534).

Mr. Newton was asked this question:

> "Now then, Mr. Newton, what loss, if any, have you sustained by virtue of the failure or the refusal of the Union Planters National Bank and Trust Company to carry out their agreement as contained in the letter of July 24, 1943, which was introduced as plaintiff's Exhibit 39? (This letter appears BR p. 659).

Mr. Roberts, attorney for the petitioning creditors objected to the question and stated:

> "There has been created no issue of this debt feature due the bank, and the testimony furnished by Mr. Dumain shows the indebtedness as of August 31 was approximately $1,300,000.00 due to this bank. The only purpose this interrogatory could have would be to seek to try a law suit or claim for breach of contract for unliquidated damages, and that would not be a ready asset and could not be an asset at all under the bankruptcy law, and, therefore, the testimony should not be permitted in this record."

BR. p. 1531

The court overruled Mr. Roberts' objection and stated:

"As I conceive the law to be, if there has been a breach of the contract which should readily be collectable, and is not of a doubtful nature, that it is a matter that can be shown in mitigation or reduction of the amount of indebtedness claimed by the debtor. While the bank is not a party in nor to this particular bankrupt proceeding, yet they have a claimed indebtedness used as one of the liabilities of the alleged bankrupt, for the very purpose of showing and having a bearing upon his solvency or insolvency. And it is my opinion that if a breach of contract should be shown with a reasonable degree of certainty, that it could be collectable within a reasonable time, and that then it would be an asset to be considered in determining his solvency or insolvency. But that if it is of a doubtful nature to such an extent as not to be reasonably certain that it could be realized upon readily, then of course it would not be admissible. The matter can be taken care of in the final instructions to the jury. If it is determined that it is an asset or a showing with reasonable certainty that the question should be presented to the jury, then I would submit it to the jury. If, however, the evidence, after it is in, should disclose that it is one of doubtful nature, either of law or fact, the whole thing would be excluded and the jury specifically instructed at that time that it was not a defense, and the amount of the indebtedness to the bank would then remain completely liquidated as an indebtedness to the bank. For that reason at this time I will overrule the objection."

BR 1531 and 1532

After some further discussion of the matter the District Judge said:

"No authorities being available by attorneys on either side upon the question raised by the Court as to

whether it is a valid contract on its face, and upon the question of whether or not the debtor is required to maintain a certain amount of solvency in order to expect a continuation of credit, and the Court being satisfied in its mind that if the only objection is that an offset could not be made under any circumstances, I would not be justified in spending probably days in hearing testimony in the absence of the jury, and then if it should hold that it was competent, to call the jury back and go over the same testimony. The Court is of the opinion that no prejudice will develop in the minds of the jury, *since it is either* a *question for an offset or else a matter of entire exclusion* if it is not admissible; and the Court will pre-em-torily instruct the jury at the proper time that the indebtedness to the bank was approximately $1,500,000 with no offset whatever.

"On the other hand, if the breach of contract becomes admissible, and evidence is shown with a reasonable degree of certainty that it was breached and that the defendant has suffered damages as a result of the breach, then the jury would be entitled to consider that in deduction of the debt. Gentlemen, I will permit the testimony to proceed now."

BR 1533, 1534

This reference to the bankruptcy proceedings very clearly indicates that Mr. Newton was attempting to get before the District Court the fact that the bank had not carried out its agreement as contained in a letter of July 24, 1943.

When the application for a receiver came on for a hearing an effort was made to get before the District Court the amount of the bank's obligation to Mr. Newton.

Mr. Wills stated:

"There was compensation and estimate to go in on the contracts other than the Brunswick job estimate, of which the government would pay $1,200,000.00 for work already completed, and that money is the money im-

pounded and turned over to the Bonding Companies as the backlog against which the government will pay for the unfinished business and a 10% retainage. I make that statement because I didn't think Your Honor grasped it."

ER p. 455

Mr. Watkins stated:

"We will agree that he will have that amount, but that is all he will have and there are liabilities against that of $3,236,000.00."

The Court:

"That is what I understood. I don't think there is a probability of him coming out whole from any amount he might receive from any of the contracts on which there might be any future indebtedness. *Likewise, as to the suit against the bank, if you should show that the bank brought about all of his losses by its default of the agreement with him you might have sufficient there to take care of it, but that is so vague, indefinite and uncertain that the Court* would not be justified in considering it an asset in view of the scant testimony before the court."

Mr. Wills:

"The Court did not permit us to go into that."

The Court:

"*I thought on this hearing both of you specifically agreed that it would not be necessary to go into that case.* Now, Gentlemen,—I have a term of Court here in April. If you want to try this case on its merits at that time I can do so and would do so. But if you want to await the outcome of the trial of the case against the bank——

Mr. Watkins:

"We will agree upon that.

The Court:

"I will try the case at any time you get ready for trial."

ER, p. 456

The foregoing reference to the record clearly and convincingly shows that the liability of the bank to Newton was expressly reserved by agreement of the parties and consent and approval of the court. The court also stated that if Newton should show that the bank brought about all of his losses by its default of the agreement with him he might have sufficient to take care of his creditors. What the court ruled was that it was an unliquidated claim and in its then form could not be used as a set-off but the court did not hold and did not intend to hold that the unliquidated claim could not be sued on and damages recovered for the bank's breach of its contract. *In view of the fact that the question of the bank's liability and its amount was expressly reserved by the District Court in this proceeding, it was manifestly inappropriate for the Circuit Court of Appeals to say that Newton owed the bank approximately $1,500,000.00 on August 14, 1943, because the Circuit Court of Appeals did not know and could not know, and neither can anyone else know, the amount the bank was obligated to account to Newton for on that date, until the suit against the bank is finally disposed of.* When that is ascertained, it may well be that the bank owed Newton instead of Newton owing the bank on August 23, 1943.

b

Be it remembered that Mr. Dumain made an audit of Mr. Newton's affairs which was introduced in evidence in the district court and which showed his assets and liabilities as of August 31, 1943 (Br. 1224-1227). Mr. Dumain testified that within the seven day period from August 23 to August 31,

there was nothing in the books to indicate any appreciable change in Mr. Newton's financial condition. Assuming therefore, that his financial condition of August 23 was the same as his financial condition as of August 31, we find according to the Dumain audit that Mr. Newton had a surplus of $288,166.86, on the day the deeds in question were executed (Br. 1227-1228).

In the same audit there is a schedule of notes, BR 1338, payable to the Memphis Bank as of August 31, 1943. This schedule shows that said bank held the notes of Newton and Newton and Glenn in the face amount of $1,360,003.93 which included a one hundred thousand dollar advance on the Brunswick, Georgia project that was let to F. T. Newton on July 24, 1943. The adjusted amount of the Brunswick contract was $2,977,503.10 (ER 806). According to the Dumain audit the Memphis Bank had only advanced $100,000.00 on the Brunswick job. Newton was entitled to have the balance advanced him on said assignment. The balance was $2,877,503.10.

For some reason the Memphis Bank did not see fit to introduce in evidence the notes it claims to hold that were executed by Newton or Newton and Glenn and we are unable to find anything in the record that says the schedule of notes contained in the Dumain audit on page 1338 of the record in the bankruptcy proceeding is inaccurate or untrue. It is reasonable to suppose that if Dumain incorrectly listed the notes held by the Memphis Bank that bank would have taken steps necessarily to expose the error in his schedule of said notes.

Evidently the court of appeals looked to the deposition of Emmett J. House (BR 1747) and the deposition of I. W. Wilson (Er. 1793) to support its finding that Newton owed the Memphis Bank approximately $1,500,000.00 on August 14, 1943.

Mr. House's deposition was dated May 26, 1944 (BR 1789). In this deposition he testified that he was vice-president and comptroller of the Memphis Bank.

"Q. Now, Mr. House, you are familiar with the books and records of the bank, and the debts and obligations due by Newton and Glenn and F. T. Newton on these various loans mentioned, are you not?"

"A. Yes, sir.

"Q. What is the amount of the indebtedness due by Newton and Glenn, the copartnership composed of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton?

"A. The present unpaid balance of Newton and Glenn to the Union and Planters National Bank and Trust Company, the principal amount is $65,457.83, interest accrued will be up to June 1, 1944, $1,554.13.

F. T. Newton owes the Union Planters National Bank and Trust Company on account of notes for his own account $489,066.06, on account of accrued interest up to June 1, 1944, $11,546.03.

"F. T. Newton owes the Union Planters National Bank and Trust Company on account of an overdraft $1,265.58.

"F. T. Newton owes the First National Bank of Atlanta on account of the participation in the notes held by the Union Planters Bank and Trust Company for the account of that bank unpaid principal in the amount of $557,556.10, accrued interest to June 1, 1944, $13,148.14.

"F. T. Newton owes the American National Bank, Nashville, on account of notes,—or on account of participation in notes executed to the Union Planters National Bank and Trust Company, unpaid principal, the sum of $357,463.74, accrued interest to June 1, 1944, of $8,560.89.

"The total of the account of F. T. Newton *to the three banks*, unpaid principal, $1,405,351.48, accrued interest $33,255.06, or a grand total of indebtedness of Newton and Glenn and/or F. T. Newton and Mrs. Newton, unpaid principal of $1,470,809.31, accrued interest, $34,809.19.

"Q. So the principal and the interest of the indebtedness of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton exceeds $1,500,000?

"A. That is correct. The notes are all past due."

On page 1758 of the same record the following occurred:

"Q. Now do you have a statement showing the advances made by your bank, or loans made by your bank to the partnership composed or known as Newton and Glenn, and to F. T. Newton?

"A. We have a statement showing those loans that now stand on our books.

"Mr. Roberts:

"We desire to introduce as Exhibit '8' to this witness' testimony said statement."

On page 1759 of the bankruptcy record the following occurred:

"Mr. Roberts:

"By agreement we next introduce as Exhibit '10' a statement of *all* notes held by the Union Planters National Bank and Trust Company and constituting obligations of Newton and Glenn, a copartnership composed of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton, and all obligations of F. T. Newton, general contractor, showing the dates of execution, the amount of the separate notes, and the person or persons signing the separate notes, and the due dates of the respective notes, and the accrued interest on each of the separate written obligations to June 1, 1944.

"(The said paper is accordingly marked Exhibit '10' to the testimony of the witness, and is attached hereto)."

Exhibit 8 and 10 referred to by the witness appear in BR 282-286.

Exhibit 8 is headed "Statement of Newton and Glenn and/or F. T. Newton Debt to Union Planters National Bank & Trust Company as of May 20, 1944."

The grand total is shown as $617,929.04 originally with payments of $63,405.15 and an unpaid balance of $554,523.89 (Br. 282).

Exhibit 10 is headed "Statement of Newton & Glenn and/or F. T. Newton Debt to Union Planters National Bank & Trust Company as of May 20th, 1944."

It is identical with Exhibit 8 except it shows who the notes were signed by. The original amount, the payments and the unpaid balance are identical with the amounts shown on Exhibit 8.

That there might be no misunderstanding about the matter Mr. Roberts was careful to point out *by agreement* (Br. 1759):

> "We next introduce as Exhibit 10, a statement of *all notes* held by the Union Planters National Bank and Trust Company and constituting obligations of Newton and Glenn, a copartnership composed of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton, and *all* obligations of T. F. Newton, general contractor, showing the dates of execution, the amount of the separate notes, and the person or persons signing the separate notes, and the due dates of the respective notes, and the accrued interest on each of the separate written obligations to June 1, 1944."

There is nothing ambiguous about that statement and if it means what it says Exhibit 10 is a schedule of all the notes held by the Memphis Bank constituting obligations of Mr. Newton. It is true that Mr. House undertook to modify his positive and unequivocal statement on pages 1754 and 1755 of the bankruptcy record for we find that on Br. 1757 Mr. House testified:

> "Q. Now, Mr. House, you have testified about this more than a million and a half dollars that is due to the Union Planters National Bank and Trust Company, but you have mentioned that the First National Bank

of Atlanta and the American National Bank of Nashville, Tennessee, were interested in these separate loans.

"A. That is correct.

"Q. Now are any of the notes executed by Newton and Glenn, or Mr. F. T. Newton, or any of the obligations of F. T. Newton, Mrs. F. T. Newton, and F. S. Glenn made out in favor of either of these two banks just mentioned, namely the First National Bank of Atlanta, and the American National Bank of Nashville?

"A. They are not.

"Q. As I understand it, so as to have it clear in the record, all of the evidence of indebtedness, and all of the guarantee agreements of these three parties are in favor of the Union Planters National Bank & Trust Company?

"A. That is correct.

While this testimony is to the effect that Mr. Newton did not execute any notes in favor of the Atlanta Bank and the Nashville Bank yet it is also clear that Mr. House's positive statement is that "Mr. F. T. Newton owes the First National Bank of Atlanta and Mr. F. T. Newton owes the American National Bank of Nashville." And we think his testimony makes it clear that the $1,500,000.00 the Court of Appeals referred to consists of the amount it is claimed Mr. Newton owed the Memphis Bank plus the amount it is claimed he owed the Nashville Bank and the amount it is claimed he owed the Atlanta Bank. That is made plain by the following statement of the witness:

> "The total of the account of F. T. Newton *to the three banks,* unpaid principal, $1,405,351.48, accrued interest $33,255.06, or a grand total of the indebtedness of Newton and Glenn and/or F. T. Newton and Mrs. Newton, unpaid principal of $1,470,809.31, accrued interest, $34,809.19."

The sums mentioned total $1,505,618.50.

Notwithstanding its claim that Newton was indebted to it in the sum in excess of $1,500,000.00, the Memphis bank filed a claim against the estate for $1,100,422.91 (Br. 822). The discrepancy between the amount claimed in the claim filed with the referee and the amount stated in the opinion of the Circuit Court of Appeals of Newton's indebtedness is not accounted for.

d

The notes Newton executed to the Memphis Bank recited "for value received" the maker promises to pay, etc. (Br. 294, 299, 304, 309).

Mr. Newton makes it clear in his testimony that he had an agreement with the Memphis Bank with reference to putting up the money. On pages 372 and 373 of the record in Mrs. Edmonson's case, Mr. Newton testified:

"A. Yes, sir.

"Q. Did you have any agreement with the bank with reference to putting up the money?

"A. Yes, sir.

"Q. Tell the Court what agreement that was?

"Mr. Watkins:

"If the Court please, I think that that is not involved here; *I don't want to go into the controversy between him and the bank as to whether there was a breach of contract.*

"By the Court:

"I am going to overrule the objection; *I don't think it is necessary to go into the merits of whether there was a breach of the contract.* I will overrule the objection because I think it is necessary to get a picture of the situation.

"Mr. Wills:

"Q. What was the agreement you had with the bank?

"A. What job are you talking about?

"Q. With reference to the Brunswick job?

"A. They were to furnish one and one-half million dollars at the high point; at no time would the loan

exceed one and one-half million dollars on the job. We might borrow three million dollars from time to time, but at no time to exceed one and one-half million dollars.

"Q. Was the bonding company advised of the contract that the Memphis bank was to put up the money?

"A. Yes, sir.

"Q. Tell the Court whether or not the bonding company required that arrangements be made before they made the bond?

"A. They required that I have sufficient cash or money to run the job before they would make the bond."

The consideration for an agreement may always be shown by parole evidence provided the parole evidence does not contradict the consideration expressed in the writing.

32 C. J. S. page 970:

"When a note recites that it was given for value received it is permissible to show by parole evidence what was the real consideration of said note."

Boothe v. *Dexter Fire Engine Company,* 118 Ala. 369-379; 24 Sou. 405.

Mr. Newton testified positively that the amount the Memphis Bank was due him was in excess of $2,033,000 (Br. 814).

As of October 16, 1943, the bank had received from the government $4,402,460.64 on the assignments the bank had taken from Newton and Glenn and it only advanced $4,175,000.00 against those assignments, leaving $227,460.64 in excess of receipts from the government over advances made by the bank on those assignments.

Mrs. Newton testified positively that she and her husband did not owe the Memphis Bank a million four hundred thousand dollars (Er. 421).

On May 31, 1944, Mr. Newton wrote the Memphis Bank as follows:

"I am not indebted to you in any sum whatever. You are indebted to me in the sum of $1,250,000.00 for

which I now make demands on you for immediate payment thereof (Br. 1528).

All of this evidence is incompatible with the idea that Newton owed the Memphis Bank approximately $1,500,000 on August 14 or August 23, 1943.

PROPOSITION III

Mrs. Edmonson had no intention of defrauding the creditors of Newton on August 23, 1943.

There is no more reason to doubt that Newton's agreements with his relatives by blood or marriage were entered into on the date they purport to have been executed, than there is for doubting that Glenn executed the agreement with his wife, son and daughter on February, 15, 1942 (Br. 183). Both men were attempting to minimize the amount of income taxes they would have to pay and they were resorting to an arrangement that was recognized as lawful at that time.

There is nothing in this record that can be tortured or twisted into an intimation that the Edmonsons knew that Newton was expecting to encounter economic difficulties when the deeds were executed.

On this point the District Judge said:

> "Under the agreement with the Edmonsons, their share of the profits in the three projects amounted to $52,000.00 each or a total of $104,000.00 for the Edmonsons. The Edmonsons desired settlement of their share in the profits since the jobs were practically completed and the Newtons thereupon agreed to convey to Mrs. Edmonson, with the consent of her husband, Mr. Edmonson, all the property described in the deeds. Newton at this time did not know that he was insolvent but from his actions was beginning to anticipate that things were not going just right and rather than call upon the bank to advance $104,000.00, he concluded to

> convey this property to the Edmonsons in settlement of their share of the profits. The Edmonsons at this time had no information as to the financial condition of Newton but honestly believed that he was solvent and they were acting in good faith at that time" (Er. 923).

The Circuit Court of Appeals should not be allowed to brush aside and disregard this definite, specific finding of fact by the District Judge because of its reluctance "to debate in artificial terms." We have no disposition to debate in artificial terms but we most earnestly and sincerely protest against the Court of Appeals annihilating a definite and specific finding of fact when the record does not justify such action on its part.

The record in this case is voluminous and we think it incumbent upon the attorneys for the respondent to point to the page of the record and the language of the witness that shows that the District Judge was mistaken in the finding of fact that was made.

This is not the kind of a case where the opinion of the Appellate Court may be substituted for the finding by the trier facts. The district judge saw and heard the witnesses. He was in a much better position to pass on their credibility than was the Circuit Court of Appeals or this Court. In disregarding the lower court's finding of fact, the Circuit Court of Appeals did not give due regard to the opportunity of the trial court to judge of the credibility of the witnesses. The Court disregarded the purpose and meaning of Rule 52(a):

> "Where parties may differ as to the correct solution of the factual problem faced, it is the duty of the court of review to refrain from attempting to substitute its findings for those of the trial court."
>
> *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. (2d) 891.

"A finding by a trier of the facts based upon conflicting evidence will not be disturbed by an appellate court."

Storley v. *Armour,* 107 F. (2d) 499.

"When the credibility of a witness is the determinative factor in arriving at the findings of fact, the reviewing court will not usually upset those findings made by the judge who had the opportunity of seeing and hearing the witnesses."

Malloy v. *New York Life Ins. Co.,* 103 F. (2d) 439;
Occidental Life Ins. Co. v. *Eiler,* 125 F. (2d) 225.

This Court has ruled that it is the duty of an Appellate Court to accept a finding of fact unless clearly and manifestly wrong.

Butte & Superior Co. v. *Clark-Montana Co.,* 249 U. S. 12, 30.

When the court of appeals held that Mrs. Edmonson had not sustained the burden of showing that there were profits to which she was entitled and that the record is wholly insufficient to support a definite finding, that upon a proper accounting profits were or would have been due the Edmonsons in the amount they claimed, the court obviously disregarded the Wooten audit (Er. 86), which was fully credited by the trial court and which has all the earmarks of an honest, intelligent, accurate statement of the amount of profits in the three jobs in which the Edmonsons were interested.

When the Circuit Court of Appeals asserted that Mrs. Edmonson joined with the Newtons to strip them of their property, it disregarded the record in this case. Mrs. Edmonson was only attempting to recover for herself and her husband that which she thought they were justly due. At the time that the property was conveyed to the Edmon-

sons it must be remembered that the bank held assignments of money due or to become due under contracts in the sum of eleven million dollars and that Newton reasonably expected to make a profit of more than $2,000,000.00 on the contracts that were then under way. Newton doubtless preferred to pay the Edmonsons off in real estate instead of asking the bank for money with which to pay the Edmonsons the share of the profits they were entitled to receive. The fact that he may have dealt generously with the Edmonsons by no means indicates that Mrs. Edmonson had any intention of defrauding his creditors. There is nothing in this record to indicate any cloud on the horizon on August 23, 1943. There is nothing to indicate that the Edmonsons knew or by the exercise of reasonable diligence could have known on August 23, 1943, that Newton even suspected that he would encounter financial difficulties. It is made clear by the record that Newton was conscious at that time that he had used money in his business which he should have accounted to the Edmonsons for months prior to the execution of the deeds in question but the very fact that Mrs. Newton and Mrs. Edmonson were sisters and that the families were close, explains why Newton felt free to deal with the Edmonsons in that manner, whereas he might not have dealt with a stranger in the same way.

As we read Judge Hutcheson's denunciation of "nepotic and fictitious arrangements" . . . as "futile as it was false and faithless to their creditors" which to us approaches the "artificial terms" which the learned Judge disdained, we are impressed that Mr. Justice Greer's classic, as reported in *Turner* v. *Hand,* 3 Wall Jr. (C. C.) 88, 112, 24 Fed. Cas. No. 14,257, at page 362 might bear repetition here.

> "The law abhors fraud. Every honest mind hates it, and even those who practice it themselves will join in the denunciation of it. It makes them feel virtuous

for the time, and they are the most ready, from the arguments of conscience, from judging of others by themselves, to believe it true, and inveigh most loudly against it. When the clamor of fraud is raised in a community, or when it is confidently charged by counsel in a court, we are prone to see all facts through a false medium, which magnifies the importance of every fact upon which suspicion of fraud may be raised, and ignores the plainest inference against it. In the midst of our virtuous indignation against fraud, *we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice.* 'Trifles, light as air,' then become 'strong as proofs of holy writ.' Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt, which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject. We all fancy ourselves wiser than perhaps others are willing to give us credit for. This feeling is gratified by what we believe to be superior sagacity. Rogues may be cunning, but they can't deceive us. Under this satisfactory belief, we become over-astute, and often see that which is not to be seen. We suffer our imaginations to take the rein from our judgments, and rush headlong in this chase after the fox called fraud. Circumstances which should avail for the proof of fraud are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion."

Fraud is so odious that it must be proved by clear and convincing evidence.

> "Astute as courts should be in the detection of fraud, they are not justified in finding it on grounds which show no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favor of honesty and fair dealing, it should receive it."

Muirheid v. *Smith*, 35 N. J. Eq. 303, 309;

McCarthy v. *Scanlon*, 176 Pa. St. 262, *35 Atl. Rep. 189.*

"Fraud may be inferred from facts and circumstances, but when these facts are suspectible of a natural and probable explanation consistently with the good faith and honesty of the parties they do not prove fraud, and the legal conclusion then is in favor of innocence."

Garrow v. *Davis*, 10 Fed. Cas. No. 5,257.

Conclusion

On August 23, 1943, there was no cloud on the horizon so far as Mrs. Edmonson could see. She had no reason to suspect that Newton was in strained circumstances. He had every appearance of a fortunate government contractor at that time. Newton took on some 23 contracts with the government after he entered into the participation contracts with the Edmonsons. It was reasonable for him to conclude that it was much better for him to settle with the Edmonsons by conveying property instead of taking cash out of his business. We do not mean that Newton would have been justified in conveying property worth much more than the amount he was obligated to account to the Edmonsons for in settlement of his obligation to the Edmonsons. It must be remembered that Mrs. Edmonson assumed substantial incumbrances on the property. Not every person is willing to take on a load like that; *but even if the property conveyed was worth much more than Newton was obligated to account to the Edmonsons for that did not affect Mrs. Edmonson's right to protection under Bankruptcy Act, Section 67 (d)(6) 11 U.S.C.A., Sec. 107, 1946, Pocketparts, page 75.*

The District judge found:

"Newton at this time did not know that he was insolvent . . . The Edmonsons at this time had no informa-

> tion as to the financial condition of Newton but honestly believed that he was solvent and they acting in good faith at that time."
>
> *Er. 923.*

Even counsel for the trustee exonerates Mr. and Mrs. Edmonson of any knowledge of Mr. Newton's financial affairs at the time the deeds were executed. In their brief, they say:

> "She (Mrs. Edmonson) knew at the very time, as did her husband, that the books of the bankrupts were in a mess. (R 486) and they could not tell the status of the bankrupts from the records. (R 488)."

If the Edmonsons could not tell Mr. Newton's financial status from the records and Newton himself could not tell it from his own books how can it even be contended that Mrs. Edmonson was undertaking to defraud the creditors of Newton by taking real property which was encumbered by a mortgage in a large amount in settlement of the monied claim that was just and past due?

The foregoing finding of the district judge who saw and heard the witnesses was a natural conclusion for a rational mind to reach after a careful analysis of the evidence. The holding of the Circuit Court of Appeals to the contrary finds no support in the record outside of some circumstances which are not inconsistent with the good faith and honesty of the parties on August 23, 1943.

Respectfully submitted,

WILKINSON & SKINNER,
Attorneys for Petitioners.

HORACE C. WILKINSON,
Of Counsel for Petitioner.